IN THE SUPREME COURT OF THE
STATE OF MONTANA

Case No. 10-0211

DIETER SCHOLZ,

Respondent/Appellant,

v.

JILL M. LUNDSTROM,

Plaintiff/Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Twentieth Judicial District Court
Sanders County, Cause No. DR-06-25
Before Hon. C.B. McNeil

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STATEMENT OF ISSUES

1. The District Court had no basis in fact or law to declare Lundstrom's $242,350.67 promissory note to Scholz fully satisfied, when Lundstrom has never made a single payment under the note.

2. The parties' marital home and the 77-acre property were, and should have been distributed as, part of the marital estate.

3. The District Court had no evidentiary basis for its valuation of the marital home and 77-acre property.

STATEMENT OF THE CASE

This case involves a four year long dispute over the equitable division of assets between Scholz and Lundstrom. On September 12, 2004, the parties were married. On March 8, 2006, after 18 months of marriage, Lundstrom filed her petition for dissolution. The dissolution case then commenced "an odyssey of proceedings in the justice and district courts" over the course of the next four years. See In re the Marriage of Lundstrom and Scholz, 2009 MT 400, ¶ 3, 353 Mont. 436, 221 P.3d 1178. This is the third time this case has been before this Court.

After nearly three years of litigation and one appeal, on December 10, 2008, the District Court entered its Order Granting Motion for Sanctions and Sanctions Order (Dkt. No. 90) In pertinent part, the order states: "Petitioner is prohibited from introducing any evidence requested by Respondent in discovery, but not produced by Petitioner." (Id.) This Court subsequently determined that the District Court did not abuse its discretion in imposing sanctions against Lundstrom. In re the Marriage of Lundstrom and Scholz, 2009 MT 400, ¶ 17, 2009 MT 400, 353 Mont. 436, 221 P.3d 1178. This Court stated that the imposition of sanctions appeared justified. See id., ¶ 20.

After remand, Scholz filed Respondent's Motion for Status Hearing and Hearing on Addressing Past Sanctions. (Dkt. No. 121.) At the hearing related to that motion, the District Court confirmed that all previously imposed sanctions remained in place. (See 01/26/10 Trans., 2:21-22, 3:4-5.) Likewise, at the outset of the trial, the District Court confirmed that all sanctions remained in place. (See 02/22/10, Trans., p. 4-7.) At trial, Scholz objected to much of Lundstrom's evidence on the grounds that Lundstrom failed to produce such evidence in

response to specific discovery requests and the District Court had previously ordered that such evidence would not be allowed into the record as a sanction for discovery abuse. (See id. at pp. 35-36, 40, 55-56, 154-155.)

Nonetheless, the District Court allowed Lundstrom's evidence in over Scholz's objections. (See id.) Among other things, the District Court allowed the expert testimony of Barbara J. Thomas and the introduction of market analyses that she had prepared. (See id., 143-144, 150.) Scholz objected to Ms. Thomas's expert testimony on the grounds that Ms. Thomas had just been disclosed as a witness to Scholz five days prior to trial and that Scholz had not had an opportunity to conduct discovery or conduct a deposition regarding Ms. Thomas's qualifications, opinions or comparative analyses related to the values of the properties.

On March 26, 2010, the District Court issued its Findings of Fact, Conclusions of Law and Decree ("Decree"). (Dkt. No. 150.) Through this timely appeal, Scholz requests review regarding three issues: (1) the District Court's determination that Lundstrom owed Scholz nothing on the $242,250.67 promissory note even though Lundstrom had made

no payments under that note; (2) the District Court's determination the two parcels of real property were premarital assets and therefore not subject to equitable distribution amongst the parties, in whole or in part; and (3) the District Court's valuations of the two parcels of property.

STATEMENT OF THE FACTS

1. Prior to the marriage, Scholz solely owned a 77-acre parcel of land that had situated upon it a metal building used as an icehouse. (See 02/22/10 Trans. 13-14, 35-36.) Scholz used this land and structure to operate his ice making and ice distribution business. (See id., p. 162, 164.)

2. The land was particularly well suited for the ice business because the property possessed significant water rights, the water was of a very high quality, and because the parcel had its own hydroelectric power generating plant which provided nearly free power to the facilities on the property. (See id., pp. 167-68, 175-76.)

3. On November 24, 2003, Lundstrom agreed to purchase the 77-acre parcel from Scholz for the amount of $565,000.00. (Dkt. No. 150, p. 4.; 02/22/10 Trans. 15-16; 21, 23-24, Ex. E and F.) As part of the

purchase for the 77-acre parcel of land, Lundstrom executed a promissory note promising to pay Scholz the sum of $242,350.57, plus interest at the rate of 5.5% per annum. (Id.) The promissory note contains an acceleration clause. (02/22/10 Trans., Ex. F.)

4. The sale of the 77-acre property was part of a 1031 tax-deferred transaction by Lundstrom, which offered her tax benefits. (Dkt. No. 150, p. 5.) That transaction saved Lundstrom money. (02/22/10 Trans., p. 170.) Scholz sold the property to Lundstrom at a reduced price in order to provide Lundstrom with a tax benefit, but never intended to sell the property to Lundstrom such that she would become the permanent owner. (See id.)

5. In exchange for a cash payment and the execution of the promissory note, Scholz executed a warranty deed transferring title of the 77-acre property to Lundstrom. (02/22/10 Trans., p. 17 - 22, Ex. E.)

6. Lundstrom never made an effort to pay Scholz any amount under the $242,350.57 promissory note. (02/22/10 Trans., 91, 18-20, 108:2-5.) Scholz has never received any payment on the promissory note. (See id., p. 173-174.)

7. Lundstrom made loans to Scholz unrelated to the promissory note, but Scholz subsequently repaid those loans. (02/2210 Trans., p. 171.)

8. In anticipation of their upcoming marriage, on July 6, 2004, Lundstrom purchased Scholz's house, which the couple intended to share as the marital home. (See Dkt. No. 150, ¶ 13; 02/22/10 Trans., p. 170.) She bought the house and 7 acres for the purchase price of $325,000. (Id.) Scholz executed a warranty deed for the benefit of Lundstrom which conveyed the property together with all improvements (Dkt. No. 150, ¶ 13.)

9. The parties married on September 12, 2004 (Dkt. No. 150, ¶ 1.)

10. After the couple moved into the marital home, Scholz extended the house by about 800 square feet. (02/22/10 Trans., p. 172.) Scholz had guest quarters added to the home. Scholz or others acting at his direction constructed an office in the home. (See id.) Scholz or others at his direction installed new appliances, custom cabinetry, and new floors, creating a "complete new kitchen." (See id.) Scholz paid for

these improvements out of the proceeds of the sale of the 77-acre parcel that he received from Lundstrom. (Id. at 172-73.) In total, Scholz paid for improvements to the home that totaled more than $50,000.00. (See id.)

11. In regard to the 77-acre parcel, Scholz and Lundstrom together constructed a 2,500 square foot warehouse on the 77-acre parcel. (See id., p. 164, 175.) Scholz provided labor to build the warehouse, including providing the electricity, water, and backhoe work. (Id., p. 164.) Further, Scholz contributed approximately $44,000.00 for payment to contractors to work on the warehouse. (Id., p. 164-165.) Scholz additionally made contributions to the log cabin that was subsequently partially constructed on the 77-acre parcel. (See id., p. 172.) In particular, Scholz paid for the roof, plumbing and septic, concrete and a staircase in the log cabin. (See id.)

12. Prior to the construction of the warehouse and the partially completed log cabin, the SBA appraised the 77-acre property at a value of $1.15 million, after which the parties listed the property on the market for $2 million. (See id., p. 175.)

13. After 18 months of marriage, Lundstrom filed a petition for

dissolution on March 8, 2006, which was subsequently docketed as Cause No. DR-06-25. (See Ver. Pet. for Dis. of Mar., dated 03/08/06.)

STANDARD OF REVIEW

The Montana Supreme Court's standard of review for dissolution cases is set forth in In re Marriage of Crilly, 2005 MT 311, ¶ 10, 329 Mont. 479, 124 P.3d 1151:

> We review the district court's findings of fact in a dissolution proceeding to determine whether they are clearly erroneous. A finding is clearly erroneous if it is not supported by substantial evidence, the district court misapprehended the effect of the evidence or our review of the record convinces us that the district court made a mistake. Bock v. Smith, 2005 MT 40, ¶ 14, 326 Mont. 123, ¶ 14, 107 P.3d 488, ¶ 14 (citations omitted). Absent clearly erroneous findings, we will affirm a district court's division of property ... unless we identify an abuse of discretion. In re Marriage of Payer, 2005 MT 89, ¶ 9, 326 Mont. 459, ¶ 9, 110 P.3d 460, ¶ 9 (citations omitted).

In a dissolution proceeding, the test for an abuse of discretion is whether the district court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. In re Marriage of Stoneman and Drollinger, 2008 MT 448, ¶ 21, 348 Mont. 17, 199 P.3d 232.

SUMMARY OF ARGUMENT

The District Court abused its discretion in three ways, each of which requires a reversal and remand for further proceedings. First, the District Court determined that Lundstrom owed "nothing further" on the $242,350.57 promissory note Lundstrom had executed in favor of Scholz where Lundstrom had not made a single payment to Scholz under the note. Second, the District Court determined that two parcels of land – the parties' marital home situated on 7 acres and Scholz's business situated on 77 acres – were Lundstrom's premarital property and were wholly exempt from equitable distribution. Based on the substantial evidence, however, those parcels should have been considered part of the marital estate and equitably distributed, in whole or in part. Finally, the District Court erred in regard to its determination of the value of those parcels of land.

After the parties had begun a romantic relationship, but prior to marriage, Scholz agreed to enter into a transaction whereby Lundstrom would become the title owner of the 77-acre parcel of land upon which Scholz's ice making business was located. Scholz agreed to enter into

this transaction, at least in part, because it would provide significant tax benefits to Lundstrom. Scholz never intended to sell the property to Lundstrom for the reduced price reflected in the sale documents such that Lundstrom would become the permanent owner. Nonetheless, in exchange for a partial cash payment and Lundstrom's execution of a $242,350.57 promissory note, Scholz executed a deed which transferred title of the property. Lundstrom, however, never made any payments to Scholz under the promissory note. Indeed, Lundstrom admits that she never made any effort to pay Scholz the balance of the purchase price of the 77-acre property. The promissory note has not been satisfied in any fashion.

In spite of the foregoing evidence, the District Court determined the 77-acre parcel was Lundstrom's premarital property and that Lundstrom owed nothing on the $242,350.57 promissory note. The District Court fails to provide adequate rationale for making such a determination, especially since the substantial evidence clearly indicates the unsatisfied promissory note should remain enforceable, or at minimum be taken into consideration regarding the equitable

distribution of property. The District Court's determination in regard to the promissory note, and alternately that the 77-acre parcel is Lundstrom's premarital property, is clearly erroneous and should be reversed.

The District Court additionally determined that Scholz had not made any contributions to the parties' marital home. But the entire body of evidence on this subject contradicts that finding. Scholz made substantial contributions to the parties' home and additional contributions to the 77-acre parcel. The District Court failed to address those contributions. Failure to provide an equitable distribution of those contributions, or even to consider them, was an abuse of discretion.

Finally, after ordering that all previously undisclosed evidence would be prohibited, and confirming that order, the trial court ultimately allowed Lundstrom to present a plethora of evidence that had not previously been provided to Scholz. Among other things, the it allowed an expert witness to testify that had been disclosed just five days prior to trial. Moreover, the District Court adopted that expert's

opinion regarding the value of the properties without ever considering or discussing the competing evidence regarding value. In both instances, the District Court abused its discretion. To the extent the properties should be properly included in the marital estate, Scholz was prejudiced by the District Court's valuation of those properties.

For each of the foregoing reasons, the District Court's Findings of Fact, Conclusions of Law, and Decree should be reversed and remanded for further proceedings.

ARGUMENT

1. The District Court erred in determining that Lundstrom owed Scholz nothing on the $242,250.67 promissory note where Lundstrom had made no payments under the note.

The District Court determined that not only was Lundstrom entitled to sole ownership of the marital home and the 77-acre business parcel on which Scholz's business was located, but also that Lundstrom was absolved of all obligations under the $242,356.67 promissory note Lundstrom executed in order to finance the purchase of the 77-acre property from Scholz. (See Decree at p. 2, lines 20-23; p. 5, lines 3 -5;

and p. 6, lines 2 - 6.) The District Court made its determination in regard to the note even though Lundstrom admits that she made no effort to pay any amounts due under the note. Indeed, Lundstrom had not even requested the District Court to determine the promissory note was satisfied – because it was not. The record, including Lundstrom's admissions, clearly indicate the promissory note was unsatisfied and therefore should remain fully enforceable. The District Court's findings and determinations in regard to the promissory note are not supported by any evidence whatsoever. It appears the District Court misapprehended the effect of the evidence and made a mistake. See Arnold v. Sullivan, 2010 MT 30, ¶¶ 17-25, 355 Mont. 177, 226 P.3d 594. The District Court's findings and conclusions in regard to the promissory note should be reversed.

Prior to the marriage, Scholz solely owned a 77-acre parcel of land that had situated upon it a metal building used as an icehouse for a ice making business. (See 02/22/10 Trans., 13-14, 35-36.) Scholz used this land and the structure to operate his ice making and ice distribution business. (See id., 162, 164.) The land was particularly well suited for

the ice business because the property possessed significant water rights, the water was of a very high quality, and because the parcel had its own hydroelectric power generating plant which provided nearly free power to the facilities on the property. (See id., 167-68, 175-76.)

After becoming romantically involved, on November 24, 2003, Scholz agreed to sell Lundstrom the 77-acre parcel for $565,000.00 as part of a tax-deferred transaction that provided significant tax benefits to Lundstrom. (Id. at pp. 14 -17, 20; Ex. E; 148-49.) But Lundstrom did not pay Scholz the full agreed upon purchase price at that time, and indeed has never paid Scholz the full purchase price of the 77-acre parcel containing Scholz's business. Rather, Lundstrom paid Scholz $322,643.33 in cash, which represented a partial payment, and executed a promissory note in favor of Scholz for $242,356.67, representing the balance of the purchase price. (02/22/10 Trans., pp. 15-16; 21, 23-24; Ex. F.) The promissory note specifies that interest accrues on the unpaid balance at 5.5% per year from November 24, 2003, forward, and the note contains an acceleration clause. (See Ex. F.) In exchange for the cash payment and the promissory note, Scholz

executed a warranty deed in favor of Lundstrom transferring title of the property. (Id. at p. 18; Ex. E.)

Lundstrom admits that she promised to pay Scholz the balance of the money owed as reflected in promissory note for the purchase of the 77-acre parcel. (02/22/10 Trans., pp. 16, 21.) Lundstrom also admits that she made no attempt to pay Scholz any amounts owed under the note. (Id., p. 91.) Indeed, it is undisputed that Scholz has not received any payment on the promissory note. (See id., p. 173-174.)

In spite of the entire evidence set forth in the record, all of it to the contrary, the District Court determined that "there now is nothing owed by [Lundstrom] to [Scholz] on the ... promissory note" and that "[Lundstrom] owes nothing further on the $242,250.67 note to [Scholz]." (Dkt. No. 150, p. 2, ll. 22 - 23; p. 5, ll. 4 -6.) But in making its conclusion in that regard, the District Court either ignored the substantial evidence in the record or misapprehended the facts. In either instance, the District Court made a mistake in determining the promissory note should be extinguished.

It is not clear on what factual basis the District Court relies upon in concluding that without having made any payments on the

promissory note, Lundstrom now owes nothing on the note. The District Court notes the cash portion of the purchase price of the 77-acre parcel was paid by Lundstrom out of the proceeds of a tax-deferred transfer of property located in Sacramento, California. (Dkt. No. 150, p. 5, ll. 1-4.) But the source of the cash from which Lundstrom partially paid Scholz for the 77-acre parcel is of no consequence. It is simply irrelevant from where Lundstrom derived the funds that she did pay Scholz in regard to a determination of what remained owing under the promissory note.[1]

The District Court also twice references the fact that Scholz used a portion of the proceeds he did receive in exchange for the transfer of the two parcels of property to satisfy an outstanding loan he had with the U.S. Small Business Administration. (Dkt. No. 150, p. 2, ll. 20-24, p. 5, ll. 3-6.) But what Scholz did – or did not do – with the proceeds of the partial payments he received for the sale of the two parcels of land cannot be relevant to a determination of whether the promissory note

[1] The fact that Lundstrom's purchase of the 77-acre parcel was part of a 1031 tax-deferred exchange is, however, relevant to determining whether the 77-acre parcel should properly have been considered as part marital estate, as discussed in section II, below.

was satisfied, just as it is irrelevant from where Lundstrom derived the funds she paid Scholz. If Scholz had not used the partial payments he received to satisfy the preexisting loan to the SBA, but rather put those amounts in a bank account, Scholz still would not have been paid the agreed upon purchase price. Regardless of what Scholz did with the money he did receive, Lundstrom is still nonetheless obligated under the promissory note to pay Scholz $242,356.67, plus interest (see 02/22/10 Trans., pp. 15-16; 21, 23-24; Ex. F.) The fact remains that Scholz still did not receive a single penny for payment under the promissory note. (See id., p. 91, 173-174.)

For her part, Lundstrom did not even seek a determination from the District Court that her obligations under the $242,356.67 promissory note were extinguished. In the December 31, 2009, Amended Dissolution Pre-Trial Order, the District Court ordered the parties to submit a proposed division of property, among other things. (Dkt. No. 134.) That order states the responses the parties file will be "deemed to have modified the pleadings accordingly and shall satisfy the requirements of a pre-trial order pursuant to Rule 5, Montana

Uniform District Court Rules." (Id.) In Petitioner's Amended Response to Amended Dissolution Pre-trial Order, Lundstrom admits that "the property is encumbered by a note held by Deiter Scholz. Deiter Scholz holds a note on this property in the sum of $242,350.67 plus interest on unpaid principal balances at the rate of 5.5% per annum." (See Dkt. No. 137, p. 3.) Further, Lundstrom admits that she has a debt owed to Scholz related to the promissory note in the amount of $242,350.67, plus interest. (See id., p. 9.) Moreover, in her disclosure of estimated future monthly expenses, Lundstrom states that she anticipates a monthly payment of $2,580.00 for "Other Notes," which could only relate to the promissory note executed in favor of Scholz, as there are no other notes specified in her schedule of debts. (See id., pp. 9-10.)

Prior to trial, Lundstrom also argued that each party should be entitled to keep all property acquired prior to the marriage. (Mem. of Law, 01/12/10, p. 5.) Lundstrom states that Scholz sold the two parcels of property to Lundstrom prior to the marriage. (Id.) Further, Lundstrom states: [t]hese contracts are binding upon the parties." (Id.) If the contracts for the sale of the properties are binding on the parties,

as Lundstrom concedes, the promissory note must also be binding on the parties. Thus, according to Lundstrom's own argument and admissions, the premarital promissory note is still binding. It is well settled the parties are bound by the admissions in their pleadings. In re the Marriage of Baker, 2010 MT 124, ¶ 28, ___ Mont. ___, ___ P.3d ___.

Lundstrom did argue at trial that any amount owed under the promissory note should be subtracted from other unrelated amounts Lundstrom had loaned Scholz. (02/22/10, Trans., p. 90-91.) Lundstrom additionally made the unsupported statement that although she has not made any payments to Scholz on the promissory note, she does not owe him any money related to the promissory note, presumably due to the other loans she had made to Scholz. (Id. at p. 108.) But Scholz testified that he had repaid all loans that Lundstrom had previously made to him. (Id. at p. 171; p. 206.) Any alleged loans Lundstrom made to Scholz prior to executing the promissory note cannot be considered as an offset. In any event, the District Court made no findings whatsoever regarding the loans Lundstrom had made to Scholz

and Scholz's subsequent repayment of those loans. As a result, the loans that Lundstrom made to Scholz and which Scholz later repaid were apparently not considered by the District Court regarding its erroneous determination that the promissory note had been satisfied.

In her proposed Findings of Fact, Conclusions of Law and Decree, submitted to the District Court after trial. Lundstrom proposes to "assume any and all debts in her name only ...." (Dkt No. 149, p. 5.) Respondent makes no other mention of the promissory note other than to again acknowledge that she executed the promissory note and promised to pay Scholz the sum of $242,350.67 plus interest at 5.5% per year. (See id., p. 3.) The promissory note Lundstrom executed is obviously a debt in her name. Thus, throughout this proceeding, Lundstrom has made no allegation that the promissory note should be extinguished due to her payment of the note. Indeed, Lundstrom has admitted that she has not made any payments under the note. (02/22/10 Trans., pp. 16, 21, 91.)

The District Court determined that Lundstrom is the sole owner of the 77–acre parcel on which Scholz's business is situated, but did not account for the unpaid promissory note. To uphold the District Court's

determination that Lundstrom is entitled to keep both parcels of property and that the promissory note is effectively extinguished would arbitrarily deprive Scholz the benefit of the premarital bargain. Through their two agreements, the parties agreed that Lundstrom would pay Scholz at a total of $890,000.00, plus interest on a portion thereof, for both of the properties. (02/22/10 Trans., pp. 12-14, 17, 20, 26-30, 148-49; Ex. A, E, and F.) Scholz held up his end of the bargain: he transferred title to Lundstrom. (See id.) Lundstrom, on the other hand, did not pay Scholz $890,000.00 plus interest. Rather, Lundstrom paid Scholz only $647,643.33, and has never paid any interest on the outstanding amount due under the $242,356.67 promissory note. (See id., pp. 91, 173-174.) As a result, Scholz still should be entitled to enforce the promissory note. In the alternative, the amounts due and owing under the promissory note should have been taken into consideration in making an equitable distribution of the 77-acre property and the remainder of the marital estate. In either event, the determinations made by the District Court in regard to the promissory note and/or the 77-acre parcel were an abuse of discretion

While inconsistencies within the distribution of a marital estate are not error per se, nonetheless a district court must offer findings and reasoning "at least to the point that the [Montana Supreme Court] need not succumb to speculation when assessing the conscientiousness or reasonableness of the district court's judgment." In re Marriage of Bartsch, 2007 MT 136, ¶ 9, 337 Mont. 386, 162 P.3d 72 (citing In re Marriage of Horton, 2004 MT 353, ¶ 7, 324 Mont. 382, 102 P.3d 1276); see also Arnold, ¶ 25.

In this case, it is impossible to decipher the District Court's reasoning in determining that Lundstrom owes nothing on the promissory note where Lundstrom had admitted that she made no effort to make payments under the note. To the extent the District Court relied on the idea that the 1031 tax-deferred exchange component of the sale should extinguish the promissory note, the District Court erred. The source of the partial payment Lundstrom provided to Scholz is irrelevant to a determination of the remaining amounts Lundstrom owes Scholz. Likewise, to the extent that the District Court relied on the idea that Scholz was able to satisfy his debt

to the SBA out of a portion of the proceeds he received from the sales of the properties, such a rationale does not justify the extinguishment of the promissory note for the balance of the purchase price. Accordingly, the District Court's finding in regard to the promissory note is not supported by the substantial evidence and constitutes a misapprehension of the evidence and a mistake. See Arnold, ¶¶ 2 and 10.

There is simply no reason either articulated in the District Court Findings of Fact and Conclusions of Law, or elsewhere in the record, to support such a result. The District Court therefore acted arbitrarily, without employment of conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice. Its decision should therefore be reversed.

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2. The District Court erred in determining that the marital home and the 77-acre business property were not property of the marital estate.

The District Court determined that the parties' marital home and the 77-acre parcel on which Scholz's ice making and distribution business is situated, were both Lundstrom's premarital property and therefore were not subject to distribution as marital estate property. (See Dkt. No. 150, p. 6, ll. 2-6.) But the District Court abused its discretion in that regard because it failed to account for the substantial evidence in the record related to the substantial contributions that Scholz made to the improvements on both parcels and the nature of the transaction regarding the 77-acre parcel, including that Lundstrom never paid the agreed upon purchase price.

Under MONT. CODE ANN § 40-4-202(1), the equitable distribution of property must be determined regardless of legal title, and embraces the theory that all property is to be distributed equitably, considering all of the circumstances of a particular marriage. Arnold v. Sullivan, 2010 MT 30, ¶ 30, 355 Mont. 177, 226 P.3d 594; see also In re Marriage of Swanson, 2004 MT 124, ¶ 12, 321 Mont. 250, 90 P.3d 418 (citing In

re Marriage of Bee, 2002 MT 49, ¶ 34, 309 Mont. 34, 43 P.3d 903. Each case must be looked at individually with an eye to its unique circumstances. In re Marriage of Aanenson, 183 Mont. 229, 234, 598 P.2d 1120, 1123 (1979).

The theory of equitable distribution recognizes, and attempts to compensate for, each party's contribution to the marriage. Arnold, ¶ 30; MONT. CODE ANN § 40-4-201(1). This Court has consistently held that under § 40-4-202(1), regardless of who holds title, "assets belonging to a spouse prior to marriage, or acquired by gift during the marriage, are not part of the marital estate unless the non-acquiring spouse contributed to the preservation, maintenance, or increase in value of that property." Arnold v. Sullivan, 2010 MT 30, ¶ 28, 355 Mont. 177, 226 P.3d 594 (emphasis on "unless" added), citing Bartsch, ¶ 21; In re Marriage of Rolf, 2000 MT 362, ¶ 46, 303 Mont. 349, 16 P.3d 345; In re marriage of Steinbeisser, 2002 MT 309, ¶ 37, 317 Mont. 74, 60 P.3d 441; In re marriage of Foster, 2004 MT 326, ¶ 11, 324 Mont. 114, 102 P.3d 16; and In re Marriage of Engen, 1998 MT 153, ¶ 26, 289 Mont. 299, 961 P.2d 738). See also MONT. CODE ANN 40-4-202. If a non-

acquiring spouse contributes to the property's preservation, maintenance or appreciation, Engen and its progeny direct the district court to award the non-acquiring spouse his or her equitable share of that preserved, maintained or appreciated value attributed to his or her efforts. Arnold, ¶ 28 (citations omitted).

A. The marital home should have been considered property of the marital estate.

The District Court found that Scholz did not make substantial contributions to the home after selling it to Petitioner. (Dkt. No. 150, p. 4, ll. 10-11.) But the substantial evidence in the record shows that Scholz contributed to the marital home's preservation and maintenance by making or at least contributing to substantial improvements. Scholz extended the residence by about 800 square feet. (02/22/10 Trans., p. 172.) Scholz had guest quarters added to the marital home. Scholz or others acting at his direction constructed an office in the marital home. (See id.) Scholz or others at his direction installed new appliances, custom cabinetry, and new floors, creating a "complete new kitchen." (See id.) Scholz paid for these improvements out of the proceeds of the sale of the 77-acre parcel that he received from Lundstrom. (Id., p. 172-

73.) In total, Scholz paid for improvements to the marital home that totaled more than $50,000.00. (See id.)

Thus, the substantial evidence before the District Court indicated that Scholz did indeed make substantial contributions to the marital home. At minimum, Scholz is entitled to an equitable distribution of those contributions, as well has the appreciation in value enjoyed during the marriage. See MONT. CODE ANN § 40-4-202.

Awarding the entire marital home to Lundstrom, with no credit for Scholz's contribution leaves Scholz without a residence of his own. Coupled with the fact the District Court determined that Lundstrom now has control of the land where Scholz's business was located, Scholz has no effective method of obtaining a new home. In addition to failing to consider the substantial contributions Scholz made to the marital home, it is arbitrary and unjust to exclude the couple's marital home out of the marital estate under the circumstances presented.

B. The 77-acre business property should have been considered property of the marital estate.

The District Court did not make a finding regarding Scholz contributions or lack thereof to the 77-acre business parcel where

Scholz's business was located. But the substantial evidence in the record shows that Scholz did make substantial contributions to that property.

Scholz and Lundstrom together constructed a 2,500 square foot warehouse on the 77-acre parcel. (See 02/22/10 Trans., p. 164, 175.) Scholz provided labor to build the warehouse, including providing the electricity, water, and backhoe work. (Id., 164.) Further, Scholz contributed approximately $44,000.00 for payment to contractors to work on the warehouse. (Id., 164-165.) Scholz additionally made contributions to the log cabin that was subsequently partially constructed on the 77-acre parcel. (See id., 172.) In particular, Scholz paid for the roof, plumbing and septic, concrete and a staircase in the log cabin. (See id.) Prior to the construction of the warehouse and the partially completed log cabin, the SBA appraised the 77-acre property at a value of $1.15 million, after which the parties listed the property on the market for $2 million. (See id., 175.) This amounts to a contribution of $850,000 in value for which the District Court allowed no compensation or benefit to Scholz. In offering no explanation for

this plainly one-sided result, the District Court acted arbitrarily or without the employment of conscientious judgment, and is therefore reversible error.

Admittedly, after the transfer of the properties to Lundstrom's name, Lundstrom did pay the property taxes on the properties and serviced the mortgage on one of the properties. But Lundstrom was able to do that because she was not paying Scholz the regular payments required under the promissory note. Even though Lundstrom also contributed to the maintenance and preservation of the properties, and perhaps to a significant degree, Scholz's contributions nonetheless should not have been disregarded altogether. At the very least the District Court should have made an effort to apportion the appreciation in value between the two contributing parties. Failing to do so was an arbitrary abuse of its discretion.

Further, circumstances surrounding Scholz's transfer of the 77-acre parcel weigh in favor of a determination that the 77-acre parcel should be considered part of the marital estate, in whole or in part, and therefore subject to an equitable distribution. Scholz sold the 77-acre parcel to Lundstrom just 10 months before the parties were married.

(See Dkt. No. 150.) Further, Scholz sold that parcel as a part of a 1031 tax-deferred transaction for Lundstrom, which offered her tax benefits. (Dkt. 150, p. 5, ll. 1-4; 02/22/10 Trans., pp. 148-49, 170.) That transaction was designed to save Lundstrom money. (See 02/22/10 Trans., pp. 170.) Scholz never intended to sell the property to Lundstrom such that she would become the permanent owner. (See id.) The property was worth substantially more than the price at which Scholz agreed to sell it to Lundstrom. (See id., 170, 175.) Scholz never intended to sell the property at such a low price. (See id., 170.)

Moreover, it is undisputed that Lundstrom did not completely pay even the low purchase price. Rather, Lundstrom promised to pay Scholz the balance of the purchase price, $242,356.67, in a promissory note. (02/22/10 Trans., pp. 15-16; 21, 23-24; Ex. F.) Lundstrom admits that she made no attempt to pay Scholz any amounts owed under the note. (Id., p. 91.) Scholz has not received any payment on the promissory note. (See id., p. 173-174.)

Thus, Scholz had no intention of permanently providing Lundstrom with title to the property, and transferred the property to

her name only in an effort to provide Lundstrom with a tax benefit. Further, Lundstrom never paid Scholz the purchase price that the parties had agreed upon. Accordingly, under the circumstances, the 77-acre property should not have been excluded from the marital estate, especially when considering the substantial contributions Scholz made to that property. See Arnold, ¶ 30.

C. It is manifest error to fail to account for the marital home and the 77-acre parcel in an equitable distribution.

Based on the substantial evidence in the record, Scholz made significant contributions to the two properties, for which any equitable distribution should account. The District Court's conclusion that "[Scholz] did not make substantial contributions to the [marital] home after selling it to the Petitioner," is in flat contradiction to Scholz's testimony. The fact that Scholz paid for $50,000.00 in remodeling to the home over a period of time is simply uncontradicted. Meanwhile, the District Court makes no findings whatsoever in regard to the improvements Scholz paid for on the 77-acre property – again despite the only evidence in the record, which establishes that he made a substantial and valuable contribution that contributed materially to

the undisputed $850,000 increase in value. Thus, the District Court's implicit and arbitrary determination in regard to the 77-acre parcel should be, at minimum, reversed and remanded for further findings regarding the valuable improvements Scholz made or contributed to on that parcel. (See id.) Scholz is entitled to his equitable share of the appreciated or preserved value of the marital home and the business property that is attributable to his efforts and contributions. See In re Marriage of Steinbeisser, 2002 MT 309, ¶ 47, 313 Mont. 74, 60 P.3d 441. At minimum, Scholz is entitled to have those contributions accounted for. (See id., ¶ 54.) Further, the District Court fails to account for the nature of the transaction that transferred the 77-acre parcel, not the least of which is the fact that Lundstrom did not pay the agreed upon reduced price for that parcel.

Based on the foregoing, both the marital home should be considered part of the marital estate and distributed equitably at least to the extent of the improvements and contributions Scholz made to the properties and to the extent he was not paid for the properties. As a matter of equity, it is simply not fair for Lundstrom to retain both properties without consideration of the nature of the transfers and

Scholz's contributions and Lundstrom's failure to pay, and also for Lundstrom to be entirely absolved from her obligations under the promissory note. The District Court's determination that both parcels are wholly outside the marital estate, and therefore not subject to equitable distribution amongst the parties, should be reversed.

3. The District Court abused its discretion in determining the values of the marital home and the 77-acre business parcel.

It is not clear why the District Court endeavored to make a finding regarding the value of the marital home or the 77-acre business parcel since the District Court ultimately determined that neither of these parcels were part of the marital estate. (See Decree, p. 4-6.) But because those parcels properly should have been included in the marital estate, in whole or in part, and distributed equitably amongst the parties, the valuation of the properties is at issue. The value that the District Court determined is based upon evidence that should have not been admitted, and additionally is not based upon the substantial evidence in the record. The District Court's valuation, therefore, should be reversed and remanded for further proceedings.

A. Lundstrom's evidence regarding the value of the properties should have been excluded.

(i) A trial should not be conducted by surprise.

Under our system, a trial should not be conducted by surprise. If it is, then a new trial is the appropriate remedy. Clark v. Bell, 2009 MT 390, ¶ 30, 353 Mont. 331, 220 P.3d 650. A party seeking a new trial by virtue of surprise must demonstrate seven elements:

(1) The moving party was actually surprised;

(2) The facts causing the surprise had a material bearing on the case;

(3) The verdict or decision resulted mainly from these facts;

(4) The surprise did not result from the moving party's inattention or negligence;

(5) The moving party acted promptly and claimed relief at the earliest opportunity;

(6) The moving party used every means reasonably available at the time of the surprise to remedy it; and

(7) The result of a new trial without the surprise would probably be different.

Clark, ¶ 30.

(ii) By allowing a host of previously undisclosed evidence into the record, the District Court conducted a trial by surprise, and should therefore be reversed.

On December 10, 2008, the District Court entered its Order Granting Motion for Sanctions and Sanctions Order (Dkt. No. 90.) That order, among other things, entered judgment in favor of Scholz as a result of Petitioner's discovery abuse. (Id.) In pertinent part, the order states: "Petitioner is prohibited from introducing any evidence requested by Respondent in discovery, but not produced by Petitioner." (Id.) Although Lundstrom filed a motion to set aside the default (which was denied), Lundstrom did not move to set aside or otherwise object to the imposition of the sanctions specified in the District Court's December 10, 2008, Order. (See Dkt., Nos. 94, 97.)

After a hearing, judgement was ultimately entered pursuant to the District Court's December 10, 2008, Order. (See Dkt. No. 101.) That judgment was the subject Petitioner's appeal before this Court (DA 09-0069), which was decided November 24, 2009. See In re the Marriage of Lundstrom and Scholz, 2009 MT 400, 353 Mont. 436, 221 P.3d 1178. This Court determined that the District Court did not abuse

its discretion in imposing sanctions against Lundstrom. (Id., ¶ 17.) This Court went on to state that the imposition of sanctions appears justified. (See id., ¶ 20.) But this Court did find the imposition of sanctions did not negate the requirement of MONT. R. CIV. P. 52(a) to enter specific findings of fact justifying the distribution of the marital estate or the requirements of MONT. CODE ANN. § 40-4-202 to equitably apportion between the parties and assets belonging to either or both and to consider several factors in distributing a marital estate equitably. (See id., ¶ 18.) This Court determined the District Court's findings of facts underlying the distribution of the martial estate were clearly erroneous because they were not based on substantial evidence in the record. (See id., ¶ 20.) On that basis – and that basis alone – this Court reversed the judgment of the district court and remanded the case for reconsideration of appropriate sanctions and an equitable distribution of the marital estate consistent with the requirements of MONT. CODE ANN. § 40-4-202. (See id., ¶ 21.)

After remand, Scholz sought clarification regarding the sanctions that the District Court had previously imposed. On December 8, 2009,

Scholz filed Respondent's Motion for Status Hearing and Hearing on Addressing Past Sanctions. (Dkt. No. 121.) The District Court held a hearing related to that motion, among other things, on January 26, 2010. (Dkt. No. 135.) At that hearing, the District Court confirmed that all previously imposed sanctions remained in place. In pertinent part, the transcript of that hearing states:

> MR. JASPER: Your Honor, we're her to address the first issue that the Supreme Court referred back to, was the appropriateness of sanctions. And what we're requesting is, the Court previously entered sanctions against the petitioner in this matter.
>
> THE COURT: My understanding is that those were untouched by the Supreme Court. So they will be – they are imposed as they were imposed, period.
>
> Now one other thing. They may not have been in the form of a judgment. If they were not, judgment is entered or will be entered as soon as counsel prepares a judgment. Be specific with respect to the Court's file, the date, time and the date of filing of sanctions that were imposed. And if you want that reduced to judgment, the Court will do so. My understanding being that the Supreme Court left those determinations alone.

(12/26/09 Trans, p. 3 - 4.)

At the beginning of the February 22, 2010, bench trial, Scholz again raised the issue of the sanctions that the District Court had

previously imposed against Lundstrom. The transcript fo the February 22, 2010, bench trial states in pertinent part:

MR. JASPER: — prior to starting that, could we discuss pre-trial information with regard to the previous orders that this Court has issued with regards to the sanctions that you said were still in effect. Is that still the case?

THE COURT: What is it you wish to take up before we start introducing evidence in the trial?

MR. JASPER; Your Honor, previously this Court has indicated that the default had been entered against the petitioner, along with the exclusion of all witnesses and information that hadn't been provided in discovery.

THE COURT: Well, if the default of the petitioner was entered, the Supreme Court effectively vacated as to the issue – sole issue of the division of property.

MR. JASPER: Correct, your Honor.

THE COURT: Yes.

MR. JASPER: That's what I believe is correct but, your Honor, when we previously had our status conference, the Court indicated that all of the sanctions were still in place.

THE COURT: Yes.

MR. JASPER: If that's the case, then –

THE COURT: It is.

///

MR. JASPER: – I believe that we are prepared to move our case forward and that the petitioner is prevented from offering any evidence.

THE COURT: That's not true, Counselor. She is – the door is wide open for introduction of evidence as to the equitable distribution of the martial estate, period. Sanctions previously imposed remain imposed. And judgment will be awarded to the respondent for any sanctions that the Court previously imposed prior to the Supreme Court opinion. They still remain in effect. If judgment wasn't entered on those, judgment will be entered when you file your post-hearing proposed findings. However, for today's hearing this is the final hearing on the division of the marital estate.

MR. JASPER: One last –

THE COURT: Yes.

MR. JASPER: So that I don't burden the Court throughout, one of the issues is the sanctions were based on lack of discovery. And they have intended to offer certain exhibits which were not produced in discovery until the 12th when this was required to be disclosed to us.

MR. GOEN: That's not true.

MR. JASPER: And as such –

THE COURT: Until the 12th of what?

MR. JASPER: When you required our disclosure to the Court, our final pretrial disclosure.

///

THE COURT: It wasn't a disclosure, those were proposals, your proposed division of the estate.

MR. JASPER: At that point –

THE COURT: It had nothing to do with discovery.

MR. JASPER: But that's when I received some of the discovery that included their exhibits.

THE COURT: Yes.

MR. JASPER: And so at this point in time – we had previously requested that information and I wanted to make sure it's clear to the Court the previous sanction was "you don't' get to use it since it wasn't provided when you ordered it previously."

THE COURT: We'll take it up painfully one exhibit at a time if something has been offered and it wasn't disclosed in discovery. The parties have had over four years for your discovery. The discovery issues are done. You may – you may still have the right to object to the introduction of any particular evidence that may not have been disclosed that was requested.

(02/22/10, Trans., pp. 4-7.)

Scholz preserved his objections to those exhibits that previously had not been provided to Scholz in discovery. Scholz objected to Lundstrom's Exhibit C, M, P, Q, H, B, and G. (02/22/10 Trans., pp. 25-36, 40, 55, 56, 67, 154, 155.) Each of Scholz' objections to Lundstrom's

proposed exhibits was premised on the same basis: Lundstrom had not provided those exhibits to Scholz in response to specific discovery requests and the District Court had previously ordered that those exhibits would not be allowed into evidence as a sanction for discovery abuse. (See id.) Despite the District Court's previous order prohibiting the introduction of evidence that had not been previously disclosed in response to discovery requests, the District Court nonetheless allowed the foregoing exhibits to be admitted into evidence over Scholz's objections.

Of equal significance, Scholz objected to Lundstrom's newly disclosed expert witnesses at trial, Carla M. Parks and Barbara J. Thomas. Scholz objected to Ms. Thomas's opinion testimony on the grounds that Ms. Thomas had just been disclosed as a witness to Scholz five days prior, that Ms. Thomas's written opinions had just been disclosed, and that Scholz had not had an opportunity to conduct discovery or conduct a deposition regarding Ms. Thomas's qualifications, opinions or comparative analyses. (See id., 153.)

Despite Scholz's objections to Ms. Thomas's testimony and market

analyses, the District Court allowed Ms. Thomas to testify regarding her opinion of the value of the marital home and the 77-acre parcel. (See id., 150-155.) Further, the District Court allowed Ms. Thomas to testify and set forth a foundation for Petitioner's Exhibits B and G, which were market analyses in which Ms. Thomas opined values for the two parcels of real estate. (See id., p. 150 - 155.)

After several hours of trial testimony, the District Court did an about face regarding its previous determination that undisclosed evidence would be prohibited. (See 02/22/10 Trans., 153.) Despite the District Court's December 10, 2008, Order, explicitly stating that "Petitioner is prohibited from introducing any evidence requested by Respondent in discovery, but not produced by Petitioner" (Dkt. No. 90); the District Court confirmation of the same at the December 26, 2009, hearing (12/26/09 Trans, p. 3-4); and it its further confirmation of the same at the beginning of trial (see 02/22/10 Trans., pp. 4-7.), the District Court nonetheless allowed Lundstrom to enter into evidence a plethora of exhibits and testimony from two previously undisclosed expert witnesses. In pertinent part, the District Court stated:

Neither party has played by the rules. This Court ordered

> both parties to file their proposals four years ago and neither one of you have done it. So you've thrown discovery and deadlines and any sanctions for violations of that out the window ....

(02/22/10 Trans., p. 153.)

The District Court's abrupt determination that all evidence would be admitted was plainly prejudicial to Scholz. Lundstrom was allowed to call new expert witnesses to express new expert opinions where neither party had previously indicated that expert testimony would be presented. Those witnesses were allowed to testify and their written opinions admitted into evidence over Scholz's objections. Significantly, Lundstrom did not object to any testimony put forth by Scholz regarding the valuation of the properties. Ms. Thomas's testimony and opinions were specifically cited by the District Court in its Findings of Fact, Conclusions of Law and Decree. (See Dkt. No. 150, pp. 4-5.) Indeed, the District Court failed to consider any of the competing testimony regarding the properties' value and rather considered only Ms. Thomas's testimony. (See id.)

Based upon the District Court's prior sanctions order prohibiting the introduction of undisclosed evidence, and subsequent confirmation

of that sanction both in a previous hearing and at the outset of the trial, Ms. Thomas's testimony and the market analyses she prepared should have been excluded from evidence. Without such evidence, a determination of the value of the properties would have inevitably been higher, as the only remaining testimony regarding the value of the properties was that they were worth between $1.15 million and $2 million. (02/22/10 Trans., 169-170.) Indeed, with some qualifications, Lundstrom admitted that at one point she had marketed the combined properties for $2 million. (Id., 101-102, 111.)

The situation in this case meets each of those elements of a trial by surprise as articulated by this Court. See Clark, ¶ 30. Until just days before trial, Scholz was unaware of that Lundstrom intended to put forth expert testimony, let alone the nature of that testimony including the identity of her expert. Due to the timing, Scholz was unable to explore such testimony or procure competing exert testimony for use his case. Had Scholz had adequate notice that expert testimony would be required, he would have obtained his own expert witnesses. Under the circumstances, however, Scholz had no notice or opportunity

to do so. The surprise Scholz suffered did not result from his inattention or negligence; rather, Scholz properly relied on the District Court's prior order and subsequent discussion stating that undisclosed evidence would not be allowed. Until the day of trial, Scholz could not have known that the District Court would allow surprise testimony.

Ms. Thomas's opinion testimony had a material bearing on this case. Indeed, the District Court directly references her testimony in the Decree and makes no reference to the competing testimony in the record. The outcome of this case would have been different if the District Court had excluded Ms. Thomas's testimony in that the valuations would have no doubt been higher based on the remaining evidence that they were worth between $1.15 million and $2 million. The circumstances of this case, therefore, meet all of the elements described in Clark. Lundstrom should not have been allowed to present the testimony she offered at trial.

The District Court's complete reliance on Ms. Thomas's testimony, which should not have been allowed, was a prejudicial abuse of its admittedly broad discretion in this arena. Trial by surprise has been

eliminated as part of our system. Yet this is just what happened here.

B. No evidence in the record supports the District Court's determination of value for the properties.

Ms. Thomas's market analyses – which Scholz had not seen until five days prior to the trial – stated that the marital home was valued at between $230,000.00 and $300,000.00 and that the 77-acre parcel was valued at between $395,000.00 and $425,000.00. But in addition to prejudicing Scholz by allowing Ms. Thomas offer her opinion at all, the District Court failed to consider that Ms. Thomas's testimony regarding the value of the parcels of real estate was inadequate. Further, the District Court failed to explain why the District Court accepted Lundstrom's assertion of value and wholly ignored Scholz's.

Lundstrom had purchased those properties from Scholz approximately six years prior for $325,000.00 and $565,000.00, respectively, which represented a reduced price. (See 02/12/10 Trans., 14 -17, 20, 26-28; Ex. E; and 170.) Thus, Ms. Thomas's combined market analyses indicated that the value of the two properties was between $625,000.00 and $725,000.00 in spite of the fact that Lundstrom had agreed to purchase the two parcels at a reduced price

for $890,000.00 approximately six years prior. (See 02/22/10 Trans., pp. 12-14, 17, 20, 26-30, 148-49; Ex. A, E, and F.) Further, Ms. Thomas's market analyses admittedly failed to adequately consider that the 77-acre property had significant water rights and had its own hydroelectric power system. (02/12/10 Trans., 157-158.) These facts alone indicate that the opinion testimony provided on Lundstrom's behalf was doubtful at best.

Further, Scholz testified the two properties and the improvements thereon were previously appraised for $1.15 million (Id., p. 169-170) and that he had been informed that the properties were worth $2 million. For her part, Lundstrom admitted that at one point she had marketed the combined properties for $2 million. (See id., p. 101-102, 111.) In spite of these facts, the District Court relied solely upon Ms. Thomas's testimony regarding her valuation of the properties without offering any justification why the District Court rejected the competing testimony.

As a general rule, if contested evidence is presented to the trial court regarding the existence or valuation of marital assets and no findings are made regarding that asset or no explanation is provided as

to why the District Court accepted one party's valuation over that of the other, the District Court has abused its discretion. In re the Marriage of Larson, 200 Mont. 134, 139, 649 P.2d 1345, 1354 (1982). "... [i[f the values are widely conflicting, the district court must state its reasoning." In re Marriage of McNellis, 267 Mont. 492, 499, 855 P.2d 412, 416 (quoting In re Marriage of Taylor, 257 Mont. 122, 127, 848 P.2d 478, 481(1993)(citations omitted). Here, the District Court failed to provide any justification why it accepted Lundstrom's evidence regarding the properties' value, but ignored Scholz's significantly higher valuation. As a result, the court erred and abused its discretion. See id; see also Larson, 139, 1354. Moreover, the District Court's determination of value was not reasonable in light of the evidence submitted.

Pursuant to the District Court's previous orders, Ms. Thomas's valuations and testimony should have been prohibited altogether. At minimum, Mr. Scholz should have had the opportunity to investigate Ms. Thomas's opinions. Instead, Scholz was prohibited from doing so as a result Lundstrom's disclosure of the opinions of valuation and Ms. Thomas as a witness just five days prior to trial. Both for failing to

prohibit Lundstrom's surprise testimony, and for failing to consider competing evidence regarding the valuations of the properties, the District Court's determination of the value of the marital home and the 77-acre property should be reversed or remanded for further proceedings.

CONCLUSION

This matter should be reversed and remanded to the District Court for revaluation and redistribution of the marital estate, taking into consideration the unpaid promissory note, Scholz's contributions to the marital estate the nature of the sale of the properties, the fact that Lundstrom failed to pay for the 77-acre property, and a fair valuation of the properties.

Dated this 26th day of July, 2010.

Respectfully Submitted,
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By:_____
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For Appellant

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of MONT. R. APP. P. 11(4)(a) because, according to the word count function of WordPerfect X3, this brief contains 9,264 words and no more than 172 words per page, excluding the parts of the brief exempted by MONT. R. APP. P. 11(4)(c).

2. This brief complies with the typeface and the type style requirements of MONT. R. APP. P. 11(2) because this brief is prepared in a proportionally spaced typeface using WordPerfect X3 Century Font type and a14 point font size.

Dated this 26th day of July, 2010.

Respectfully Submitted,
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By:_____
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Robert D. Erickson
For Appellant

CERTIFICATE THAT DISKETTE HAS BEEN
SCANNED AND IS VIRUS-FREE

1. The DVD-R diskette enclosed herewith complies with Mont. R. App. P. 12(11) because Appellant's Opening Brief was published to a pdf document so that it is searchable; and

2. The DVD-R diskette submitted to the Court is virus-free.

Dated this 26th day of July, 2010.

Respectfully Submitted,
SULLIVAN, TABARACCI & RHOADES, P.C.

By:_____
Quentin M. Rhoades
Robert D. Erickson
For Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 2010, I filed a true and accurate copy of the foregoing Appellants Opening Brief with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing upon each attorney of record and each party not represented by an attorney in the above-referenced District Court action as follows:

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